IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO. 380 OF 2003

Hindustan Organic Chemicals
Ltd., .. Petitioners.
vs.
Apollo Trade Ltd., .. Respondents.

Mr. H. Toor i/by Crawford Bayley & Co.
for petitioners.
Mr. C.S. Balsara with A.H. Gokhale i/by
A.S. Dayal & Associates
for the company.

CORAM : S.U.KAMDAR, J.
DATE : 2nd DECEMBER,2004.

P.C.

1. The present petition is filed under section 434 of the Companies Act, 1956 for winding up of the respondent company on the ground that the company is unable to pay its debt.

2. According to the petitioner, pursuant to the orders placed by the company from time to time the petitioner supplied to the respondent diverse quantities of phenol. It is further case of the

petitioner that in respect of the said supply of goods an amount was due and payable by the company to the petitioner. According to the petitioner the said amount was liable to be paid within the period of 60 days from the date of supply of the goods under each of the invoice. According to the petitioner, after the period of credit is expired i.e. 60 days, the petitioners are entitled to levy 2% what is known as delayed payment charges. For the aforesaid claim of 2%, the petitioners are relying upon the printed clause on the invoice which inter alia reads as under :-

> "The agreed credit period for payment of dues on account of this sale is 60 days. If the amount is not paid within the agreed credit period, the customer will be charged delayed payment charges at 2.00 % per month for the amount remaining outstanding beyond agreed credit period. All the payments received from the customer in future will first be adjusted towards outstanding delayed payment charges and only the remaining amount will be adjusted towards principal amount due on any account."

3. According to the petitioner, the petitioner supplied the goods as per the orders placed from time to time. However, the respondent company has

failed and neglected to effect payment in respect of the aforesaid supplies. According to the petitioner, in so far as the principal amount is concerned, the entire amount has been paid save and except the balance principal amount of Rs. 1 lac and odd in respect of two of the invoices. Whereas, according to the respondent company, the entire principal amount is fully paid off and the dispute only pertains to delayed payment charges.

4. The learned counsel for the petitioner has contended before me that the principal amount is outstanding in respect of two invoices i.e. at page 1 of the compilation being invoice no. 10126 dated 11.6.1998 and the invoice no. 101521 dated 22.6.1998. It is the contention of the petitioner that out of the said two invoices part payments are made and Rs. 1 lac and odd are outstanding. The petitioner further contended that the respondent company is liable to pay delayed payment charges at the rate of 2% in accordance with the printed clause contained in the said invoices. According to the petitioner they have issued credit note in respect of the said delayed payment charges and the respondent company is liable to effect payment thereof.

5. According to the learned counsel for the petitioner, thus if the delayed payment charges is

taken into account then as of today, there is an outstanding of Rs. 1,23,80,152.69. The learned counsel for the petitioner thereafter drew my attention to pages 8 and 12 of compilation of documents and has inter alia contended before me that there is an acknowledgement of the liability to pay the amount by the respondent company. According to the petitioner in so far as the dispute raised pertaining to the delayed payment charges is concerned it is not a bonafide dispute in as much as by a letter dated 30.11.2000 the respondents themselves requested the petitioner for waiving varying of the DPC charges meaning thereby that though they admit liability they request waiver of payment thereof. On the aforesaid basis, the learned counsel for the petitioner has contended that the respondent company has failed to pay the amount due and payable by the respondent company to the petitioner herein. According to the learned counsel for the petitioner a statutory notice was issued on 23.10.2002 and by a letter dated 19.11.2002 the respondent company has only replied that they are reconciling the account and they are expecting cash flow to be positive by mid-December and thereafter they shall make payment of the principal amount. In view of the aforesaid correspondence, according to the learned counsel for the petitioner, the respondent company has admitted and acknowledged the liability for making payment of

the balance principal amount as well as delayed payment charges and, therefore, the dispute raised now are not bonafide dispute and the petition under section 434 is required to be admitted.

6. The learned counsel for the petitioner has thereafter contended before me that the correspondence by and between the parties indicate that there has been a settlement even in respect of the delayed payment charges and thus liability to make payment of the delayed payment charges was accepted by the respondent company. The learned counsel for the petitioner drew my attention to the letter dated 23.10.2000 inter alia recording therein the minutes of the meeting where the representative of the company was also present. In the said letter the petitioner company has agreed to allow the set off of the delayed payment charges against the quantity discount offered to the respondent company for supply of the said phenoil. The petitioner's contention is that on the basis of the said letter dated 23.10.2000 it can be duly stated that the liability of making payment of the delayed payment charges has been accepted by the respondent company in toto. According to the petitioner company no bonafide dispute arises and therefore the respondent company being liable to pay its admitted claim is liable to be wound up.

7. The learned counsel for the petitioner has relied upon the judgments which are set out hereinbelow.

(1) The judgment of the Bombay High Court in the matter of Tata Finance Ltd., vs. Kanoria Sugar & General Manufacturing Company Ltd., reported in 2002 (3) Bom. C.R. 173.

(2) The judgment of the Bombay High Court in the matter of G.K.W. Ltd., v. Shriram Bearings Ltd., reported in AIR 1999 Delhi 27.

(3) The judgment of the Delhi High Court in the matter of Devendra Kumar Jain v. Polar Forgings and Tools Ltd., reported in 1995 Company Cases Vol.84, page 766;

(4) The judgment of the Madras High Court in the matter of Tube Investments of India Ltd., vs. Rim & Accessories (P) Ltd., reported in Company Law Journal (1990) 3 Comp. L.J. 322;

(5) The judgment of the Punjab and Haryana High Court in the case of Stephen Chemical Ltd., vs. Innosearch Ltd., reported in 1986 Company Cases Vol. 60 page 702.

By relying upon the aforesaid judgments, the learned

counsel has strenuously contended that the dispute raised by the respondent company in the present case is not bonafide and, therefore, the present petition should be admitted. There is no dispute to the proposition of law that if there are no bonafide dispute raised by the company then in that situation the company petition is liable to be admitted for winding up of the company on the ground that company is deemed to be unable to pay its debt and that the company is commercially insolvent. However, only question which has to be determined is whether in a given case there are bonafide disputes or not. In my view the same is essentially a question of fact which depends upon the facts of each case. I have to determine in the present case that whether the disputes raised by the company are bonafide or not.

8. The respondent company has on the other hand urged before me that there is no liability to pay the DPC charges at all. He has further contended that in so far as the principal amount is concerned, the entire amount has been duly paid off to the petitioner company. He has drawn my attention to paragraph 8 of the petition in which it is claimed by the petitioner that there is an amount due and payable by the company in the sum of Rs.24,40,750.90. He has pointed out paragraph 9 of the petition, in which the petitioner has admitted that out of the aforesaid amount a sum of Rs.

24,18.552.70 has been paid off. He has further drawn my attention to page 77 of the compilation of documents produced by the petitioner company and contended that after filing of the petition a further amount of Rs. 25,000/- each has been paid by four cheques totalling to Rs. 1 lac and thus the entire principal amount has been paid off by the respondent company to the petitioner herein. The learned counsel for the respondent company has also urged before me that various vital documents which are relevant for the purpose of the present case have not been disclosed by the petitioner in their petition. He drew my attention to the correspondence annexed to the affidavit in reply, particularly the letter dated 4.1.2003. The said letter dated 4.1.2003 refers to the meeting of the respondent company with that of the petitioner on 23.12.2002. It is mentioned in the said letter that the disputes between the parties were finally sorted out and settled in the said meeting. By the said letter dated 4.1.2003 the company has forwarded the proposal to pay off the entire principal amount and has stated that on receipt of the principal amount and acceptance thereof by the petitioner in full and final settlement of all claims by and between the parties will stand fully settled and extinguished. In the said letter dated 4.1.2003, it was clearly mentioned that the respondent company is not going to pay any delayed payment charges and shall only

pay the principal amount. After setting out the aforesaid facts, the respondent company has called upon the petitioner to accept the said principal amount in full and final settlement of the dues. Further, by letter dated 9.1.2003, the respondent company forwarded two cheques for Rs.14,49,204.17 and Rs.8,11,631.00 aggregating to Rs.22,60,835.37 stating therein that if they accept the proposal of the respondent company dated 4.1.2003 then only the petitioner should deposit these cheques towards the outstanding amount and with the said deposit all outstanding will stand cleared and that the petitioner shall issue a no due certificate accordingly. It is an admitted position before me that the entire amount has ben accepted by the petitioner company and the said two cheques have been encashed. In view of the same, it is now not open for the petitioner to contend that there is an outstanding of delayed payment charges as payable by the respondent company to the petitioner. In any event, from the series of correspondence which is produced before me by compilation i.e. right from 2000 onwards it is clear that the issue as to the delayed payment charges was subject matter of negotiation by and between the parties and in 2003 the respondent company has offered the said settlement in full and final settlement of all claims of the petitioner. The petitioner having accepted the said claim by way of full and final

settlement and by encashing the said cheques, it cannot be said that there is any amount due and payable. In any view of the matter, it is not possible for me to hold that this dispute raised by the respondent company is not bonafide. The petitioner has thereafter contended that there is also an outstanding of principal amount apart from the delayed payment charges of about Rs. 1 lac. It has been contended by the petitioner that if the claim is of more than Rs. 500/- then in that event, the company petition should be admitted. According to the petitioner company in respect of the principal amount there having no dispute there having outstanding of Rs. 1 lac and thus, the present petition should be admitted.

9. I have considered the aforesaid contentions and I am of the opinion that the said contention has also no merit. It is an admitted position that after filing of the petition, four cheques are paid by the respondent company to the petitioner of sum of Rs. 25,000/- each. It is the case of the petitioner that though they received the said amount, the same has been adjusted by them towards the delayed payment charges and not towards the principal. It is contended before me that it is because there was no direction to appropriate the said amount towards a particular debt i.e. the principal amount while forwarding the cheques and in

view thereof they as a creditor were entitled to adjust the said cheques against the delayed payment charges though the same were forwarded with the intention to pay towards the principal amount. The learned counsel for the petitioner has relied upon a judgment of the Supreme court in the case of M/s. Industrial Credit and Development Syndicate now called I.C.D.S. Ltd., vs. Smt. Smithaben H. Patel and others, reported in AIR 1999 SC 1036. I am of the view that the aforesaid judgment in fact operates against the petitioner. Once the respondent company tendered the amount of Rs. 8 lacs and odd and Rs. 14 lacs and odd in respect of full and final settlement of all the claims of the petitioner and petitioner having accepted the said cheques in full and final settlement of the said claim, now it is not open for the petitioner to claim the further amount in that behalf. The letter dated 4.1.2003 and 31.1.2003 read together leave no manner of doubt that the said payment was tendered in full and final settlement of all the claims. The payments which are referred to being Rs. 25,000/- each and of the period 2001-2003 and the aforesaid correspondence being of 2003, I find the aforesaid correspondence of the full and final settlement of the respondent company is subsequent to the so called adjustment by the petitioner. In the aforesaid view of the position, I am of the opinion that in the present case there are bonafide disputes

raised by the respondent company which require an appropriate trial in appropriate forum.

10. In the aforesaid facts of the present case, it is not possible for me to hold that the respondent company is unable to pay its debt and thus, the present petition should be admitted. I am of the opinion that the bonafide dispute being raised by the respondent company, the present petition can not be entertained and the same is liable to be dismissed. The petition is accordingly dismissed. However,there shall be no order as to costs.